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No. 88-95

In the Supreme Court of the United States

OCTOBER TERM, 1988

JAMES L. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred by relying on a theory not advanced at trial to affirm the district court's admission of documents into evidence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 837 F.2d 1009.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1988. A petition for rehearing was denied on May 2, 1988 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on June 25, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of income tax evasion, in violation of 26 U.S.C. 7201, and signing a false income tax return, in violation of 26 U.S.C. 7206(1). He was sentenced to a four-year term of imprisonment and a $25,000 fine.

At trial, the government chose to proceed against petitioner by the "net worth" method of proof (Pet. App. A3). The government established the likely source of petitioner's increase in net worth by showing that two corporations controlled by petitioner generated large amounts of revenue by conducting bingo games on behalf of charities. Despite significant fluctuations in attendance at the games, the sponsoring charity received only $150 for each session. That sum was listed as the net proceeds of each session on the Income and Expense Report submitted by petitioner to the charity (*id.* at A4). The government also introduced evidence that petitioner misrepresented the gross income and expenses for the bingo sessions. That evidence included testimony that the Income and Expense Reports submitted to the charities overstated the rent paid on the bingo halls by about $385,000 per year (10 Tr. 440-452; 11 Tr. 747-750).

2. On appeal, petitioner contended that the trial court erred by admitting the Income and Expense Reports under the "business records" exception to the hearsay rule, Fed. R. Evid. 803(6). In its brief on appeal, the government conceded that the reports were not admissible on that theory, but urged that the reports were admissible as admissions by Williams or his agents, under Fed. R. Evid. 801(d)(2)(A) and 801(d)(2)(D). The court of appeals agreed with the government that the reports were admissible on those grounds (Pet. App. A6-A14).

The court rejected petitioner's argument that it was improper for the government to rely on an evidentiary theory not advanced below. The court noted that on either the theory accepted at trial or the theory advanced on appeal, the reports were admissible for the truth of their contents (Pet. App. A10-A11). Moreover, the court held that there was no unfairness in upholding the admission of the reports on a new theory, because the record established a

sufficient foundation for the admission of the reports as party admissions (*id.* at A11-A12). In particular, the court noted that petitioner's bookkeeper had testified that the initials "J" or "JW" on several of the papers appeared to be in petitioner's handwriting, which provided a sufficient foundation for the admission of the reports under Fed. R. Evid. 801(d)(2) (Pet. App. A12).

ARGUMENT

Petitioner renews his claim that the court of appeals erred by upholding the admission of the reports on a theory not presented to the trial court.

1. This case falls within the general rule that a trial court's decision to admit evidence will not be reversed where there exists any proper basis for its admission. See, *e.g.*, *United States* v. *Moore*, 748 F.2d 246, 248 (5th Cir. 1984); *United States* v. *Burnette*, 698 F.2d 1038, 1048 (9th Cir.), cert. denied, 461 U.S. 936 (1983); *United States* v. *Evans*, 572 F.2d 455, 488 (5th Cir.), cert. denied, 439 U.S. 870 (1978). Cf. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943). In *Shepard* v. *United States*, 290 U.S. 96 (1933), this Court recognized an exception to that general rule, but the court of appeals properly held the *Shepard* exception inapplicable to this case.

In *Shepard*, a murder case, the court of appeals held that the trial court had erroneously admitted as a dying declaration the victim's out-of-court statement that "Dr. Shepard has poisoned me." The court of appeals nonetheless upheld the admission of that statement under the state of mind exception to the hearsay rule (290 U.S. at 98-100). This Court reversed, holding that the admission of the evidence at trial could not be justified on the ground cited by the court of appeals. The Court held that the evidence would not have been admissible under the state of mind

exception because it did not reflect the victim's state of mind in any respect that was material to the issues in dispute at trial (290 U.S. at 103-104). In any event, the Court held, the admission of the evidence as a dying declaration permitted the jury to use the evidence for any purpose, while the admission of the evidence to show the victim's state of mind would not have permitted the jury to consider the statement for its truth, even though it would have been almost impossible for the jurors not to do so (290 U.S. at 102-103). Therefore, the Court concluded, the court of appeals erred by relying on the state of mind exception, because the evidence had been admitted at trial for a purpose broader than would have been permitted under the theory embraced by the court of appeals.

In this case, unlike *Shepard,* the evidentiary rule on which the trial court relied and the rule relied on by the court of appeals were closely related. Both rules permitted the jury to consider the contents of the statements for their truth, and there was no risk under either rule that the jury might consider the statements for a forbidden purpose. At trial, the jury was permitted to consider the reports to show that profits skimmed from the bingo operations were the likely source of petitioner's increase in net worth. Had the reports been admitted as party admissions, the jury could have considered them for exactly the same purpose. Accordingly, the unfairness that the Court identified in *Shepard* is not present here.

For the same reason, the decision of the court of appeals does not conflict with the decision of the Second Circuit in *United States* v. *Check,* 582 F.2d 668 (1978). In *Check,* the court of appeals held that the trial court erred by admitting the out-of-court statements of a police officer as prior consistent statements of the witness. The court then rejected the government's assertion on appeal that the

testimony was admissible for the more limited purpose of aiding the jury in understanding background events (*id.* at 680-681). In *Check*, as in *Shepard*, the purpose for which the evidence was offered, received, and considered by the jury at trial was much broader than would have been permitted under the theory the government advanced on appeal.

This case does not resemble *Check*, but instead resembles the Second Circuit's earlier decision in *United States* v. *Rosenstein*, 474 F.2d 705 (1973). In *Rosenstein*, the trial court improperly admitted evidence under the "business records" exception. The court of appeals sustained the admission of the evidence on other grounds—as a party admission or a co-conspirator declaration. The court explained that *Shepard* was "clearly distinguishable" (*id.* at 711), because "[h]ere there is no difference in the *purpose* for which the evidence is sought to be admitted on the alternative grounds. The purpose * * * is to establish the truth of that which is contained in the declaration" (*id.* at 710). The reasoning in *Rosenstein* applies directly to the instant case, where, similarly, there was no difference in the purpose for which the evidence could be used under the theory adopted on appeal and the purpose for which it could be used under the theory adopted at trial.

2. Nor does the decision below conflict with this Court's decison in *Giordenello* v. *United States*, 357 U.S. 480 (1958). At trial in that case, the government relied on the validity of an arrest warrant to introduce evidence seized at the time of the defendant's arrest (*id.* at 487). On review, this Court held the arrest warrant invalid (*id.* at 486-487). The Court declined to affirm the admission of the evidence on the government's theory, not advanced at trial, that the arrest was valid because it was supported by probable cause to believe the defendant had committed a felony. The Court explained that "[t]o permit the govern-

ment to inject its new theory into the case at this stage would unfairly deprive the petitioner of an adequate opportunity to respond" (*id.* at 488), since the defendant had no reason at trial "to rebut the contentions that the Government makes here for the first time" (*ibid.*).

There was no such prejudice to petitioner in the instant case. This is not a case like *Giordenello,* in which the foundation for the admission of the evidence (a finding of probable cause) was not offered at trial. In this case, the court of appeals based its decision that the reports were admissible as party admissions on foundation evidence that was presented at trial and made a prominent part of the government's proof. In particular, the court of appeals relied on the testimony of petitioner's bookkeeper as to the identity of the handwriting on the reports. In addition, other evidence connected petitioner to the reports that were submitted to the charities. Thus, petitioner was aware that the government was attempting to connect him to those documents, and he had every incentive and opportunity to rebut the government's showing. Accordingly, there is no merit in petitioner's assertion (Pet. 4-5, 10-11) that the court of appeals' decision violated his Fifth and Sixth Amendment rights by depriving him of the opportunity to disprove the factual foundation for the admission of the reports.

Nor does *United States* v. *Ordonez,* 737 F.2d 793 (9th Cir. 1983), support petitioner's position. In *Ordonez,* the Ninth Circuit found that the government failed to establish *any* foundation for the admission of certain ledger entries under either Fed. R. Evid. 801(d)(2) or 803(6). In this case, by contrast, the court of appeals correctly determined that the bookkeeper's testimony established a sufficient foundation for the introduction of the Income and Expense Reports as admissions by peti-

tioner under Fed. R. Evid. 801(d)(2)(A). See Fed. R. Evid. 901(a), 901(b)(2).

3. In any event, even if the admission of the reports was erroneous, the error was harmless. The evidence at trial, apart from the reports, firmly established that petitioner received substantial unreported income from the bingo sessions. Government experts testified that the net proceeds from the bingo games were far greater than the $150 reported by petitioner (10 Tr. 440-452). Employees of the charities testified that the charities always received $150 per session regardless of the number of people in attendance (9 Tr. 358, 380-382). Testimony of petitioner's bookkeeper, corroborated by petitioner's tax returns (10 Tr. 747-750), indicated that petitioner dramatically overstated business expenses from the bingo sessions in reports to the sponsoring charities. And the evidence established substantial unexplained cash deposits during the same period to an account maintained in the name of a corporation controlled by petitioner.

In addition, while the government is allowed to prove tax evasion on the net worth theory by demonstrating a likely source of taxable income, see *Holland* v. *United States,* 348 U.S. 121, 138 (1954), it is also entitled to rely entirely on evidence negating nontaxable sources of income, see *United States* v. *Massei,* 355 U.S. 595 (1958). In this case, the government presented compelling evidence ruling out the receipt of income from nontaxable sources without relying at all on the bingo game reports.* Thus, even assuming the admission of the disputed evidence was error, the error was harmless.

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* The government negated all nontaxable sources of income (*i.e.*, gifts, inheritances, insurance proceeds, and loans) by contacting petitioner's business associates, relatives, and friends (12 Tr. 838-840, 888-891, 900-904). It also rebutted petitioner's primary defense at trial

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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that nontaxable loans and cash gifts from specified relatives and acquaintances were the source of deposits to his corporate bank account (Pet. App. A5) by establishing a lack of documentation for the alleged loans (14 Tr. 1335-1339, 1378-1381; 15 Tr. 1431-1436, 1575), and the alleged lenders' lack of financial resources to make the loans (10 Tr. 529-530, 550; 11 Tr. 771-772; 12 Tr. 902-909; 15 Tr. 1416-1423, 1569-1570). The government also introduced evidence contradicting testimony by petitioner's mother-in-law that she gave her daughter substantial cash gifts (9 Tr. 309-312; 12 Tr. 894-895; 13 Tr. 1062; 15 Tr. 1445-1451).

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